Supreme Court, U. S.
FILED
AUG 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-1675, 76-1676, 76-1677, 76-1814

NORTH CAROLINA UTILITIES COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

August 9, 1977

[Counsel listed on inside cover]

CHARLES R. CUTLER
JOHN L. BARTLETT
JOHN B. WYSS
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D.C. 20006

Counsel for Aeronautical Radio, Inc.

JOSEPH M. KITTNER
EDWARD P. TAPTICH
MCKENNA, WILKINSON & KITTNER
1150 17th Street, N.W.
Washington, D.C. 20036

JOHN S. VOORHEES
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20036

Counsel for Computer and Business Equipment Manufacturers Association

HERBERT E. MARKS
STEPHEN R. BELL
WILKINSON, CRAGUN & BARKER
1735 New York Avenue, N.W.
Washington, D.C. 20006

Counsel for Independent Data Communications Manufacturers Association, Inc.

RICK M. STEIN
SIGELMAN & STEIN
9595 Wilshire Boulevard
Beverly Hills, Cal. 90212

Counsel for Phonetele, Inc.

IRVING K. KALER
KALER & FRANKEL, P. C.
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

Counsel for Rollins Protective Services Company

JOSEPH E. KELLER
WAYNE V. BLACK
LARRY S. SOLOMON
KELLER & HECKMAN
1150 17th Street, N.W.
Washington, D.C. 20036

Counsel for American Petroleum Institute

J. ROGER WOLLENBERG
DAVID R. ANDERSON
WILLIAM T. LAKE
NEIL J. KING
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

J. GORDON WALTER
International Business Machines Corporation
Old Orchard Road
Armonk, New York 10504
Of Counsel

Counsel for International Business Machines Corporation

EDWIN B. SPIEVACK
IAN D. VOLNER
COHN & MARKS
1920 L Street, N.W.
Washington, D.C. 20036

Counsel for North American Telephone Association

CHARLES M. MEEHAN
KELLER & HECKMAN
1150 17th Street, N.W.
Washington, D.C. 20036

Counsel for Utilities Telecommunications Council

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement Of The Case	2
A. The Commission Proceedings and Orders	2
B. The Decision Below	5
Reasons For Denying the Writ	6
I. The Courts Have Repeatedly Confirmed that the FCC Has Authority To Regulate the Attachment of Terminal Equipment to the National Telephone Network	8
II. The Commission Properly Exercised Its Jurisdiction To Include Carrier-Provided Equipment Within the Registration Program	13
III. The Commission Considered the Economic Impact of the Registration Program to the Extent Required by the Communications Act, and Its Decision to Proceed with the Program Was Proper and Adequately Supported	19
Conclusion	24

TABLE OF AUTHORITIES

Page

CASES:

American Trucking Ass'ns, Inc. v. *United States*, 344 U.S. 298 (1953) 14
Associated Press v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971) 24
AT&T v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976) 24
Bowman Transp., Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 22
California v. *FCC*, No. 75-2060 (D.C. Cir. June 20, 1977) 6, 9
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 19
Coastal Bend Television Co. v. *FCC*, 234 F.2d 686 (D.C. Cir. 1956) 23
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 24
FCC v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) 17, 18, 19
FCC v. *Schreiber*, 381 U.S. 279 (1965) 24
FCC v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949) 23
General Tel. Co. v. *FCC*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969) 12
General Tel. Co. v. *United States*, 449 F.2d 846 (5th Cir. 1971) 18, 22
GTE Serv. Corp. v. *FCC*, 474 F.2d 724 (2d Cir. 1973) 14
Hawaiian Tel. Co. v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974) 17, 18, 19
Hush-A-Phone Corp. v. *United States*, 238 F.2d 266 (D.C. Cir. 1956) 9
MCI Telecommunications Corp. v. *FCC*, No. 75-1635 (D.C. Cir. July 28, 1977) 18
Mt. Mansfield Television, Inc. v. *FCC*, 442 F.2d 470 (2d Cir. 1971) 14
Nader v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975) 19, 24
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 7, 14

TABLE OF AUTHORITIES—Continued

Page

North Carolina Utils. Comm'n v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976) 5, 6, 9
Panhandle Eastern Pipe Line Co. v. *Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951) 13
Panhandle Eastern Pipe Line Co. v. *Public Serv. Comm'n of Indiana*, 332 U.S. 507 (1947) 13
Pocket Phone Broadcast Serv., Inc. v. *FCC*, 538 F.2d 447 (D.C. Cir. 1976) 18
Puerto Rico Tel. Co. v. *FCC*, 553 F.2d 694 (1st Cir. 1977) 6, 9
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943), 332 U.S. 194 (1947) 19
Sherdon v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (Neb. 1975) 9
St. Joseph Tel. & Tel. Co. v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974), *aff'g United States Dep't of Defense* v. *General Tel. Co.*, 38 F.C.C.2d 803 (1973) 9
United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 14
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 7, 12, 14
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 17
Washington Utils. & Transp. Comm'n v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) 18, 19, 24

FCC AND STATE ADMINISTRATIVE AGENCY PROCEEDINGS:

Advisory Committee for Interconnection of Telephone Dialers and Answering Devices, 33 F.C.C. 2d 526 (1972) 3
AT&T (Foreign Attachments), 15 F.C.C.2d 605 (1968), *reconsideration denied*, 18 F.C.C.2d 871 (1969) 3

TABLE OF AUTHORITIES—Continued

	Page
AT&T (Mebane Home Tel. Co.), 53 F.C.C.2d 473 (1975), *aff'd sub. nom Mebane Home Tel. Co.* v. *FCC*, No. 75-1617 (D.C. Cir. April 30, 1976) (unpublished opinion)	23
AT&T (Railroad Interconnection), 32 F.C.C. 337 (1962)	10
AT&T (TWX), 38 F.C.C. 1127 (1965)	10, 16
Carterfone, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968)	*passim*
Fallon Travelodge, 14 F.C.C.2d 972 (1968)	10
First Report, 61 F.C.C.2d 766 (1976) (Docket No. 20003)	22
First Report and Order, 56 F.C.C.2d 593 (1975) (Docket No. 19528)	*passim*
Hush-A-Phone Corp., 22 F.C.C. 112 (1957)	11
Investigation into Customer-Provided Communications Terminal Equipment, No. 9625 (Cal. Pub. Utils. Comm'n July 19, 1977)	11
Johnson v. *Southwestern Bell Tel. Co.*, 18 F.C.C.2d 679 (1969)	10
Jordaphone Corp. v. *AT&T*, 18 F.C.C. 644 (1954)	10
Katz v. *AT&T*, 16 F.C.C. 421 (1951), *rehearing denied*, 43 F.C.C. 1328 (1953)	10
Liberalized Interconnection of Customer-Owned Equipment, No. 26894 (N.Y. Pub. Serv. Comm'n June 15, 1977) (on rehearing)	11
Memorandum Opinions and Orders, 57 F.C.C.2d 1216, 58 F.C.C.2d 716, 59 F.C.C.2d 83 (1976) (Docket No. 19528)	5, 17
Notice of Inquiry, 46 F.C.C.2d 214 (1974) (Docket No. 20003)	22
Notice of Inquiry, 35 F.C.C.2d 539 (1972) (Docket No. 19528)	3
Peters Sunset Beach, Inc. v. *Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363 (Minn. R.R. & Whse. Comm'n 1965), *aff'd*, No. 8529 (Minn. Dist. Ct. 8th Dist. 1966)	11
Recommended First Report and Order, 53 F.C.C. 2d 221 (1975) (Docket No. 19528)	4

TABLE OF AUTHORITIES—Continued

	Page
Second Report and Order, 58 F.C.C.2d 736 (1976) (Docket No. 19528)	*passim*
Southwestern Bell Tel. Co., 6 F.C.C. 529 (1938)	10
Telerent Leasing Corp., 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976)	10
United States Dep't of Defense v. *General Tel. Co.*, 38 F.C.C.2d 803, *review denied*, F.C.C. 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974)	10
Use of Recording Devices, 11 F.C.C. 1033 (1947)	10

STATUTES:

Communications Act of 1934:

Section 1, 47 U.S.C. § 151	12, 13, 15
Section 2(b)(1), 47 U.S.C. § 152(b)(1)	*passim*
Section 3, 47 U.S.C. § 153	12, 15, 16
Section 4(j), 47 U.S.C. § 154(j)	24
Sections 201-205, 47 U.S.C. §§ 201-205	12, 15, 16
Section 214, 47 U.S.C. § 214	17
Section 221(b), 47 U.S.C. § 221(b)	*passim*
Section 410, 47 U.S.C. § 410	3

MISCELLANEOUS:

47 C.F.R. § 68.2(b), (c)	4
F.C.C. Tariff No. 259—Wide Area Telecommunications Service	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-1675, 76-1676, 76-1677, 76-1814

NORTH CAROLINA UTILITIES COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

JOINT BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

QUESTIONS PRESENTED

The Federal Communications Commission—with the endorsement of reviewing courts—previously determined that telephone companies may not refuse to permit the attachment of customer-provided terminal equipment to the interstate telephone network. In the decision reviewed below, the Commission adopted rules designed to protect the network against potential technical harm from the

attachment of terminal equipment. The rules require that all terminal equipment attached to the network meet certain engineering specifications and be registered with the Commission. The questions presented are:

1. Did the Commission have jurisdiction under the Communications Act of 1934 to establish technical standards and procedures for the attachment of terminal equipment to the network?

2. In establishing rules to govern the attachment of terminal equipment to the network, was the Commission required to exempt equipment furnished by the carriers?

3. Did the Commission give adequate consideration to economic factors in prescribing its new rules?

STATEMENT OF THE CASE

A. The Commission Proceedings and Orders

In its 1968 *Carterfone* decision,[1] the Federal Communications Commission (the "Commission" or "FCC") required carriers to permit customers to attach their own terminal equipment ("customer interconnection") to the nationwide interstate telephone network. Since the facilities that make up the network are used interchangeably to make calls both within a single state and across state lines, the necessary result of *Carterfone* was to permit the attachment of customer-provided equipment to facilities used for intrastate as well as interstate service.

Carterfone allowed carriers to establish tariff regulations designed to protect against technical harm to the telephone network from customer interconnection. Carriers responded with tariff restrictions that permitted customers to effect attachment only through the use of

[1] 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968).

carrier-provided connecting arrangements ("CAs") and network control signaling units ("NCSUs").[2] This requirement applied even where the customer's equipment being attached was identical to equipment supplied by the carriers and regularly connected to the network without any such special connecting devices. In 1972, the Commission instituted an inquiry—Docket No. 19528—to determine whether the CA and NCSU limitations on customer interconnection contained in the carrier tariffs were just and reasonable or whether there were less restrictive, yet technically feasible, alternatives that would permit users to realize more fully the benefits of customer interconnection without creating a potential for harm to the telephone network.[3]

[2] The Commission never specifically approved the CA and NCSU tariff restrictions imposed by the carriers. It simply allowed them to become effective while it sought additional information as to less restrictive alternatives for protecting the system from harm. *See* discussion n.3 *infra*.

[3] *Notice of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board, Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972). Sensitive to the state interest in interconnection, the Commission also established a Federal-State Joint Board under 47 U.S.C. § 410 to consider and make recommendations based on comments submitted by interested parties.

Even before instituting the formal inquiry, the Commission had instructed the Chief of the Common Carrier Bureau to begin gathering information on possible alternative means to protect the telephone system from technical harm. *See AT&T (Foreign Attachments)*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871 (1969). In addition, the Commission retained the National Academy of Sciences and the consulting firm of Dittberner Associates to evaluate possible alternatives that would provide adequate protection for the network. In studies submitted in 1970, both groups concluded that the network could be protected from harm by adopting appropriate standards and implementing them in a certification program. *See Notice of Inquiry*, 35 F.C.C.2d 539 (1972) (Docket No. 19528). Advisory Committees were also established. *See id.; Advisory Committee for Interconnection of Telephone Dialers and Answering Devices*, 33 F.C.C.2d 526 (1972).

In November 1975, the Commission released its *First Report and Order* in Docket No. 19528, declaring unlawful the interstate tariff provisions that required the use of carrier-supplied CAs and NCSUs to attach customer-provided equipment to the national telephone network.[4] The Commission found that such tariff provisions were unnecessarily restrictive and discriminated unjustly and unreasonably among users and among suppliers of terminal equipment. In lieu of such provisions, the Commission prescribed a registration and standardization program under which equipment that is registered with and satisfies engineering standards established by the Commission may be attached to the telephone network without the use of carrier-supplied CAs and NCSUs.[5] The registration program reflects the Commission's distillation and assessment of the voluminous technical and engineering data that had been developed and submitted to it over the years since 1969.[6] It applies to both carrier and non-carrier terminal equipment, although most existing carrier-provided equipment has been grandfathered.[7] In March 1976, the Commission issued a *Second Report and Order*,[8] extending the registration program to certain additional types of terminal equipment.

Petitioners and others petitioned the Court of Appeals for the Fourth Circuit for review of both reports and orders, contending that the Commission had improperly asserted jurisdiction over intrastate communications fa-

[4] 56 F.C.C.2d 593 (1975), Pet. App. at 1b.

[5] The registration program, including its provisions for registration of carrier-supplied equipment, was essentially the same as that recommended by the Federal-State Joint Board instituted by the Commission to consider the interconnection matter. *Recommended First Report and Order*, 53 F.C.C.2d 221 (1975).

[6] *See* discussion p. 3 n.3 *supra*.

[7] *See* 47 C.F.R. § 68.2(b), (c).

[8] 58 F.C.C.2d 736 (1976), Pet. App. at 1c.

cilities, that the Commission was without authority to impose registration requirements on carrier-provided equipment, and that the registration program was invalidly adopted because inadequate consideration was given to its economic impact.

B. The Decision Below

On March 22, 1977, the court below, one judge dissenting, affirmed the orders of the Commission.[9] Although only eleven months earlier another panel of the same court [10] had considered and rejected the contention that the Commission lacks authority to regulate customer interconnection to facilities used jointly for interstate and intrastate communications, the court fully analyzed and again rejected Petitioners' arguments on this issue. Agreeing with the panel that had earlier considered the issue, the court concluded that if Petitioners' view of the statutory limitations on FCC power were accepted, "the FCC would necessarily be prevented from discharging its statutory duty . . . to regulate interstate communication." [11] Accordingly, it held that FCC regulations "must preempt any contrary state regulations where the efficiency or safety of the national communications network is at stake . . . ." [12]

[9] *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977). The decision also upheld *Memorandum Opinions and Orders* issued by the Commission in 1976 making certain modifications in the registration program in response to carrier motions for reconsideration. 57 F.C.C.2d 1216, Pet. App. at 1d; 58 F.C.C.2d 716, Pet. App. at 1e; 59 F.C.C.2d 83, Pet. App. at 1f. The panel consisted of Judges Tuttle and Rives of the Fifth Circuit and Judge Widener, who dissented.

[10] The panel consisted of the late Judge Hastie of the Third Circuit, Judge Tuttle, and Judge Widener, who also dissented in that case. *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976).

[11] 552 F.2d at 1045.

[12] *Id.* at 1046.

The Court below found that the registration program —as applied to both customer-provided and carrier-provided terminal equipment—was an appropriate exercise of FCC authority to protect the interstate network from technical harm while facilitating enlarged and more efficient use of communications facilities. And the court concluded that the Commission had adequately weighed economic impact factors in reaching its decision.[13]

REASONS FOR DENYING THE WRIT

Petitioners have failed to present any persuasive reasons why the decision below should be reviewed by this Court. The central question—whether Sections 2(b)(1) and 221(b) of the Communications Act bar the FCC from regulating the attachment of terminal devices to the interstate telephone network—has been uniformly and correctly resolved in the Commission's favor in all the circuits that have considered it. The arguments now advanced anew were insufficient to induce grant of certiorari as recently as last December. *North Carolina Utils. Comm'n.* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976). The most significant development in the intervening period was that two more circuits rejected the claim that the FCC is without jurisdiction to regulate the attachment of terminal equipment to facilities used jointly for interstate and intrastate service.[14]

---

[13] Judge Widener dissented as to the major holdings of the court. In his view, the Commission is without power either to regulate interstate facilities also used for intrastate communications or to impose a registration program on carrier-provided equipment, and, in any event, erred in adopting the registration program without first completing a full-scale evaluation of the economic effects of customer-provided terminal equipment on the operations of carriers. 552 F.2d at 1056.

[14] *Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977); *California* v. *FCC*, No. 75-2060 (D.C. Cir. June 20, 1977).

The only element of this case that can be said to present anything new or novel is the challenge to the Commission's authority to require registration of new carrier-provided terminal equipment. But the argument that the Commission must exempt such equipment from a registration program that is otherwise of universal applicability verges on the frivolous. In light of the Commission's statutory authority over interstate communications facilities, its central responsibility to assure rapid and efficient interstate communications service, and the broad construction placed by this Court upon the Commission's role under the Communications Act even in the absence of specific statutory directives,[15] the Commission's authority to include carrier-provided as well as customer-supplied terminal equipment under the registration program cannot seriously be questioned.

Having found that reposing primary responsibility in the carriers to protect the telephone network from harm had produced unjust, unreasonable, and unnecessary restrictions on customer interconnection, the Commission determined that it should assume this responsibility directly and concluded that a registration program was needed to discharge the responsibility effectively. In the Commission's view, failure to include carrier equipment in the registration program on the same basis as customer equipment would ignore the fact that the former presents the same potential for harm to the network as the latter. The wisdom of the Commission's determinations on such technical and engineering-based issues is, of course, not a question for a reviewing court. It is sufficient that—as is obviously the case here—the Commission had a rational basis for the policy it adopted to deal with these technical problems.

---

[15] *See National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168, 172 (1968).

The economic impact contention of Petitioners is also unworthy of consideration on certiorari. Petitioners would have this Court believe that the FCC has embarked on a major new regulatory approach that may have disastrous effects on the ability of interstate carriers to serve the public and that the Commission has failed to weigh the economic considerations involved before doing so. The facts are to the contrary.

The Commission's interconnection policy is of long standing and has been accepted by both the carriers and the states; indeed, the 1968 *Carterfone* decision, formulating that policy, was not even appealed. What is at stake here is not a major new policy, but simply the elimination of unjust and unreasonable tariff restrictions on customer interconnection and the substitution of uniform technical standards and registration procedures designed to insure protection of the telephone network from harm. The Commission adequately considered the potential economic impact of the program on carrier revenues (finding this to be minimal) and properly balanced the anticipated costs to the carriers against the public benefits of the program (finding that the latter outweighed the former).

I. The Courts Have Repeatedly Confirmed that the FCC Has Authority To Regulate the Attachment of Terminal Equipment to the National Telephone Network.

The basic jurisdictional argument that Petitioners seek to raise before this Court on certiorari is precisely the one that they have raised unsuccessfully before the courts on at least five separate occasions during the past two years. In April 1976, a panel of the Fourth Circuit rejected the contention that Sections 2(b)(1) and 221(b) of the Communications Act deprive the Commission of authority to regulate the attachment to the telephone network of terminal equipment that is used to provide both

interstate and intrastate service.[16] Petitioners' subsequent request to this Court for review of that decision on certiorari was denied last December.

Undaunted, Petitioners raised the same jurisdictional argument in the court below, and, in a March 22, 1977 opinion, it was again rejected. Barely a week later, the Court of Appeals for the First Circuit also rejected the same jurisdictional argument. Its decision upheld the Commission's authority to prevent carriers from restricting the attachment of customer-provided equipment to the telephone network even though the equipment would be used in part to provide intrastate service.[17] In June 1977, the District of Columbia Circuit joined the First and Fourth Circuits in affirming the Commission's authority to regulate the interconnection of such equipment.[18] No circuit has taken a contrary position; indeed, these recent decisions—directly on point—were foreshadowed by earlier decisions of both federal and state courts.[19]

---

[16] *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976).

[17] *Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977).

[18] *California* v. *FCC*, No. 75-2060 (D.C. Cir. June 20, 1977). Petitioners' suggestion that the District of Columbia Circuit might take a view contrary to that of the First and Fourth Circuits (United System Service Pet. at 21-22) is refuted by the recent decision in *California* v. *FCC*.

[19] *See St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974), *aff'g United States Dep't of Defense*, 38 F.C.C.2d 803 (1973); *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956). In *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (Neb. 1975), the Nebraska Supreme Court overturned a Nebraska Public Service Commission order which prohibited interconnection when no state authorization had been obtained. In so doing, the court explained:

> "If each state were to be free to establish its own rules governing interconnections for the purposes of intrastate services, uniform nondiscriminatory interstate services throughout the country would be made difficult, if not impossible." *Id.* at 777, 229 N.W.2d at 536.

The Commission, too, has consistently rejected the contention that Sections 2(b)(1) and 221(b) deprive it of authority to regulate the type of equipment involved here. As early as 1938, the Commission declared that its jurisdiction encompassed facilities used jointly for interstate and intrastate service, even where the intrastate use was predominant.[30] FCC decisions over the years have consistently adhered to this position,[31] with *Carterfone* eventually establishing the right of customers to attach their own terminal equipment to the telephone network even though such equipment would, of necessity, be used in connection with intrastate as well as interstate service. In its post-*Carterfone* decisions, the Commission has continued to assert jurisdiction over facilities and practices in circumstances where both interstate and intrastate service necessarily are involved.[32]

---

[30] *See Southwestern Bell Tel. Co.*, 6 F.C.C. 529 (1938).

[31] *See Use of Recording Devices*, 11 F.C.C. 1033 (1947); *Katz* v. *AT&T*, 16 F.C.C. 421 (1951), *rehearing denied*, 43 F.C.C. 1328 (1953); *Jordaphone Corp.* v. *AT&T*, 18 F.C.C. 644 (1954); *AT&T (Railroad Interconnection)*, 32 F.C.C. 337, 339 (1962); *AT&T (TWX)*, 38 F.C.C. 1127 (1965).

[32] *Fallon Travelodge*, 14 F.C.C.2d 972 (1968); *Johnson* v. *Southwestern Bell Tel. Co.*, 18 F.C.C.2d 679 (1969); *United States Dep't of Defense* v. *General Tel. Co.*, 38 F.C.C.2d 803, *review denied*, F.C.C. 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974); *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 97 S. Ct. 651 (1976).

Petitioners argue that *Carterfone* and, indeed, all Commission decisions prior to the present one were limited, in a strictly formal sense, to the interstate tariffs of telephone carriers. United System Service Pet. at 5-7. But the same is true of the present registration program. And the practical impact on intrastate service that Petitioners complain of here was also present in prior cases. Thus, as the Petitioners themselves recognize (United System Service Pet. at 8), after *Carterfone*, the carriers filed new tariffs for intrastate service with state regulatory commissions that mirrored the new provisions contained in the interstate tariffs filed with the FCC.

State regulatory agencies since 1934 [33] have also recognized the need for uniformity of regulation and the primacy of federal authority and have deferred to the interstate tariffs filed by the carriers with the FCC.[34] Most recently, the Public Utilities Commission of California acknowledged the need for such deference in an opinion adopting a state certification program for terminal equipment:

> "We, as a state regulatory commission, may adopt rules for direct interconnection; however, they may not be more onerous than those adopted by the FCC with its primary federal jurisdiction." [35]

The decision of the court below is thus entirely consistent with both the long-standing pattern of federal and state administrative practice and the decisions of all courts that have considered the jurisdictional point at issue here. This uniform rejection of Petitioners' proposed construction of Sections (2)(b)(1) and 221(b) reflects the obvious lack of merit in their position.

---

[33] The pre-1934 decisions of state regulatory commissions which Petitioners cite (AT&T Pet. at 22) shed no light on the division of regulatory authority that Congress established in the Communications Act of 1934.

[34] For example, after the decisions in *Carterfone*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968), and *Hush-A-Phone Corp.*, 22 F.C.C. 112 (1957), AT&T modified its state tariffs to make them consistent with the interstate tariff filings.

[35] *Investigation into Customer-Provided Communications Terminal Equipment*, No. 9625, slip op. at 4 (Cal. Pub. Utils. Comm'n July 19, 1977). Similarly, one of the more recent cases cited by Petitioners in support of their position that the states have regulated terminal facilities in a plenary fashion recognizes the secondary role actually played by the states. *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363, 367 (Minn. R.R. & Whse. Comm'n 1965), *aff'd*, No. 8529 (Minn. Dist. Ct. 8th Dist. 1966) (recognizing that the tariffs filed by the carrier with the state commission were modified to be "substantially identical to comparable tariffs filed . . . with the Federal Communications Commission"). *See also Liberalized Interconnection of Customer-Owned Equipment*, No. 26894, slip op. at 4-5 (N.Y. Pub. Serv. Comm'n June 15, 1977) (on rehearing).

Under the Act, the FCC's jurisdiction extends to "all instrumentalities, facilities, apparatus, and services . . . incidental to [interstate or foreign communication.]" [26] And Sections 201 through 205 grant the Commission plenary authority to regulate such facilities and services, as well as related charges and practices involved in the provision of interstate and foreign communications service. This "broad authority" [27] is necessary if the Commission is to discharge its statutory responsibility to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." [28]

Petitioners' reading of Sections 2(b)(1) and 221(b) cannot be reconciled with this broad jurisdictional grant and the comprehensive nature of the Commission's responsibilities with respect to interstate communications service.[29] As the court below emphasized, the registration program prescribes the terms on which terminal equipment may be "used directly to effectuate interstate communication." [30] If the Commission were not authorized

[26] 47 U.S.C. § 153(a), (e), (f).

[27] *United States* v. *Southwestern Cable Co.*, 392 U.S. at 168. Courts have repeatedly held that the grant of jurisdiction to the Commission should be construed expansively "in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole." *General Tel. Co.* v. *FCC*, 413 F.2d 390, 398 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

[28] 47 U.S.C. § 151.

[29] Section 2(b)(1), properly construed, precludes the exercise of FCC jurisdiction only over facilities and services that are technically and practically separable from interstate communications service. And Section 221(b), as the court below noted, merely preserves the authority of state commissions to regulate local exchange service in metropolitan areas that straddle state lines, such as New York, Washington, D.C., and Kansas City. *See* 552 F.2d at 1045.

[30] *Id.* at 1048.

to prescribe the terms for the attachment of such equipment to the network, various states might prescribe different and incompatible attachment conditions, thereby creating serious interference with interstate telephone service. It was precisely such a situation that Congress sought to avoid when it created the FCC and charged it with the obligation to insure the availability of "adequate [interstate telephone] facilities at reasonable charges." [31] Although the exercise of FCC jurisdiction over terminal equipment may have an indirect impact on state regulation of intrastate telephone service, that impact does not defeat the Commission's jurisdiction. As the court below noted, "FCC regulations must preempt any contrary state regulations where the efficiency or safety of the national communications network is at stake . . . ." [32]

II. The Commission Properly Exercised Its Jurisdiction To Include Carrier-Provided Equipment Within the Registration Program.

Petitioners contend that carrier-provided terminal equipment should have been exempted from the registration program, because no provision of the Communica-

[31] 47 U.S.C. § 151.

[32] 552 F.2d at 1046. Because the states retain their regulatory authority to set rates for carrier-provided equipment, intrastate calls, and a host of other intrastate services, *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951) and *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Indiana*, 332 U.S. 507 (1947), relied upon by Petitioners (N.C.U.C. Pet. at 36), are inapposite. In those cases, the Court rejected the contention that Congress had completely foreclosed state regulation even when there was no conflict between federal and state law. No such issue is presented in this case. The registration program presents a situation in which, as this Court recognized in *Panhandle-Indiana*, federal power must prevail to the extent that there is a conflict between state and federal regulation in an area to which the jurisdiction of a federal agency extends. 332 U.S. at 523.

tions Act specifically authorizes the Commission (in so many words) to require carriers to register their equipment before attaching it to the interstate telephone network. AT&T Pet. at 25-30. However, as the court below observed, this niggardly approach to statutory construction

> "contradicts all relevant authority and confounds the very purpose of agency delegation—institutionalization of authority to fashion policies and programs that implement broad legislative mandates in presently unforeseeable circumstances." [83]

Thus, courts have concluded that "even absent explicit references in the statute, the expansive power of the Commission in the electronic communications field" [84] includes the power to adopt rules designed to implement the purposes of the Act.[85]

---

[83] 552 F.2d at 1051 (footnotes omitted). As this Court has observed, the inability to anticipate every potential problem and specifically to provide a remedy for each such problem is the principal reason for creating an administrative agency such as the FCC. *See American Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 309-10 (1953); *National Broadcasting Co.* v. *United States*, 319 U.S. at 219-20.

[84] *GTE Serv. Corp.* v. *FCC*, 474 F.2d 724, 731 (2d Cir. 1973) (absence of reference to computers and data processing in the Act does not prohibit the FCC from adopting rules regulating the entrance of common carriers into those non-regulated fields).

[85] *See National Broadcasting Co.* v. *United States*, 319 U.S. at 219 (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was creating a regulatory agency."); *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 480-81 (2d Cir. 1971) (recognizing FCC authority to regulate prime time access in television despite the absence of specific statutory reference to such power). *See also United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).

The essence of the Commission's statutory mandate is to insure that the American people enjoy rapid and efficient interstate communication service "with adequate facilities at reasonable charges . . . ." [86] To discharge this responsibility, the Commission must be able to adopt the regulatory policies it finds necessary to protect the technical integrity of the nationwide telephone network. It can scarcely be denied that the establishment of technical specifications for the attachment of terminal equipment to the telephone network is reasonably calculated to protect the technical integrity of the network. And requiring the registration of such equipment—whether supplied by a carrier or a non-carrier—is surely one approach that the Commission reasonably could adopt to insure that such specifications are met. Thus, the Commission's jurisdiction over "all instrumentalities, facilities, [and] apparatus . . . incidental to" interstate telephone communication [87] and its responsibility to protect the network from harm provide a direct statutory predicate for regulating the attachment of terminal equipment.[88]

In the period between the *Carterfone* decision and the adoption of the registration program, the Commission relied on the carriers to take the steps necessary to insure that customer-provided terminal equipment would not jeopardize the technical integrity of the network. The registration program represents a Commission determination that the benefits of attachment of customer-supplied terminal equipment can be realized more fully if the FCC itself assumes the primary responsibility for in-

---

[86] 47 U.S.C. § 151.

[87] *Id.* § 153(a), (e), (f).

[88] Moreover, as the court below held, the inclusion of carrier-supplied equipment is a logical application of the Commission's authority under Section 205 of the Act to determine and prescribe just, fair, and reasonable regulations and practices to be observed by carriers. *See* 552 F.2d at 1051-52.

suring that such equipment does not harm the network. This choice between two alternative regulatory approaches to protect the system from harm is one that falls clearly within the Commission's discretion.

It would stand Title II of the Communications Act on its head to suggest that while the Commission may adopt a registration requirement for customer-provided equipment, it may not do the same for equipment supplied by the common carriers. It is the carriers who are subject to the Commission's broad regulatory authority under Sections 201-205 of the Act, and it is they who furnish the bulk of the "instrumentalities, facilities, [and] apparatus" on which the Commission and the public must rely for the provision of interstate telephone service.[39]

There was ample basis for the Commission's exercise of its authority over carrier-supplied terminal equipment in this instance. The Commission's principal reason for refusing to exclude carrier-supplied equipment from the registration program was the fact that it "possesses the same *potential* for harm to the network [as customer-supplied equipment] . . . ."[40] The Commission also

[39] 47 U.S.C. § 153(a), (e), (f). Indeed, the Commission has for many years regulated numerous practices involving carrier-supplied terminal equipment. *See, e.g., AT&T (TWX)*, 38 F.C.C. 1127 (1965) (FCC regulation of carrier-supplied station and supplemental equipment used in furnishing teletypewriter exchange service). And AT&T's current tariffs on file with the FCC address various matters relating to the use of terminal equipment that it provides. *See, e.g.*, F.C.C. Tariff No. 259—Wide Area Telecommunications Service, p. 8.1 (installation, inspection, maintenance, and repair of carrier-provided terminal equipment), p. 9 (payment arrangements for charges for installation of carrier-supplied equipment used in connection with wide area telecommunications service).

[40] *First Report and Order*, 56 F.C.C.2d at 601, Pet. App. at 15b. (emphasis in original). This is particularly so since, as the Commission noted, "much carrier-supplied equipment is purchased from independent manufacturers who market identical equipment to the general public." *Id.* There are more than 1,600 different carriers purchasing various types of equipment from a host of different

concluded that inclusion of carrier-provided equipment will be useful in facilitating the collection of technical data to assist the Commission in deciding what is necessary adequately to protect the network.[41] While Petitioners may dispute the Commission's conclusions on these matters, their disagreement does not raise any issue appropriate for review in this Court.[42]

The Commission was also aware of the competitive advantage that the carriers would enjoy if equipment they supplied was exempted from the registration program. And the decision to include carrier-supplied equipment within the program reflected, in part, the Commission's determination that the overall public interest would not be served if carriers enjoyed such an advantage.[43] Contrary to Petitioners' contention, this is in no way inconsistent with the holdings of *FCC* v. *RCA Communications, Inc.*[44] and *Hawaiian Telephone Co.* v. *FCC*.[45]

The *RCA* and *Hawaiian Telephone* decisions stand for the proposition that, in deciding whether to authorize additional common carrier service under Section 214 of the Communications Act,[46] the Commission may not simply

suppliers. *Memorandum Opinion and Order*, 57 F.C.C.2d at 1218, Pet. App. at 4d. In making its determination, the Commission also had before it evidence demonstrating that carrier-supplied equipment had given rise to a significant number of malfunction complaints in the past and that it might well malfunction and cause harm to the interstate telephone network in the future. *See* Bell System Customer Trouble Report Summary for Fourth Quarter 1974 and Computer and Business Equipment Manufacturers Association comments of July 21, 1975 and January 9, 1976, submitted in Docket No. 19528.

[41] *First Report and Order*, 56 F.C.C.2d at 601, Pet. App. at 15b.

[42] *Cf. Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

[43] *Id.* at 601, Pet. App. at 15b-16b.

[44] 346 U.S. 86 (1953).

[45] 498 F.2d 771 (D.C. Cir. 1974).

[46] 47 U.S.C. § 214.

assume that the "public convenience and necessity" will be served by increased competition.[47] In the present case, no question of certificating additional carriage is involved. In any event, those two decisions held only that the Commission "is not free to create competition for competition's sake"; they did not hold that it should "propagate monopoly for monopoly's sake" or suggest that the Commission may not consider the beneficial effects of competition in a specific area subject to its jurisdiction.[48]

Thus, under *RCA* and *Hawaiian Telephone*, the Commission may rely on the creation of competition as a decisional factor where, based on its own judgment and its evaluation of the particular matter at hand, it finds that the effects of additional competition in the provision of a communications service will be in the public interest.[49] In the present case, the Commission emphasized that its objective was not to promote competition for its own sake but to remove impediments to full realization of the benefits of its established customer interconnection policy while ensuring adequate protection against technical harm

[47] *See FCC* v. *RCA Communications, Inc.*, 346 U.S. at 89-90.

[48] *MCI Telecommunications Corp.* v. *FCC*, No. 75-1635, slip op. at 23-24, 32-33 (D.C. Cir. July 28, 1977).

[49] *FCC* v. *RCA Communications, Inc.*, 346 U.S. at 94-97; *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d at 777; *see Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d at 701 n.11 (approving FCC policy of increasing competition in the interconnection field in order to maximize consumer choice in quantity and quality of telephone interconnection equipment); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, 1158-59 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (approving FCC determination that the public interest would be served by increasing competition in the specialized communications field, where the judgment as to the benefits of competition was based on the Commission's "cumulative knowledge of the industry" and the entire record in the proceeding); *Pocket Phone Broadcast Serv., Inc.* v. *FCC*, 538 F.2d 447 (D.C. Cir. 1976); *General Tel. Co.* v. *United States*, 449 F.2d 846, 857 (5th Cir. 1971).

to the network.[50] The Commission's action and its articulated reasons for that action fully satisfy the standards of *RCA* and *Hawaiian Telephone*.[51]

III. The Commission Considered the Economic Impact of the Registration Program to the Extent Required by the Communications Act, and Its Decision to Proceed with the Program Was Proper and Adequately Supported.

Petitioners take issue with the manner in which the Commission has exercised its authority in the present case. Specifically, they assert that the Commission was required to, but did not, defer implementation of the registration program until it had made a wide-ranging inquiry into the economic effects that the substitution of customer-provided for carrier-supplied terminal equipment would have on matters such as carrier revenues and intrastate telephone rates. AT&T Pet. at 30-37. Once the Commission's actions in Docket No. 19528 are placed in their proper perspective, this contention is seen to be baseless.[52]

[50] *Second Report and Order*, 58 F.C.C.2d at 740, Pet. App. at 9c.

[51] *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d at 1158-59.

[52] Petitioners also contend that the court below substituted its own analysis for the analysis and findings that the Commission failed to make with regard to economic issues. AT&T Pet. at 30-37. This wholly mischaracterizes the court's actions. The court properly reviewed the record to determine whether the Commission had observed the applicable substantive and procedural requirements set forth in the Communications Act. *See* 552 F.2d at 1053-54, 1056. And it correctly found that the Commission had made the necessary findings and satisfied itself that those findings were adequately supported—thereby properly discharging the functions of a reviewing court. *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Nader* v. *FCC*, 520 F.2d 182, 193 (D.C. Cir. 1975). The Petitioners' claim that the doctrine of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), 332 U.S. 194 (1947), has been violated has no basis.

Petitioners claim that the registration program opens the door for the first time to wholesale substitution of customer-supplied terminal equipment for facilities that would otherwise have been provided by the carriers. In fact, as the court below recognized,[53] substitution of customer-provided terminal equipment has been authorized at least since 1969, when the carriers filed new tariffs in response to the Commission's *Carterfone* decision. The purpose of the inquiry in Docket No. 19528 was

> "not to revisit [the] *Carterfone* [question of whether customers should be able to attach their own equipment to the telephone network] but rather to review the present limitations imposed on the attachment of equipment to [the public communications] network." [54]

Since Docket No. 19528 was limited to the narrow issue whether the carriers' CA and NCSU limitations on the existing right of customer interconnection were unjust, unreasonable, or discriminatory, the Commission, as noted by the court below, was required to "focus on the economic effects of the elimination of CAs and NCSUs only." [55]

This does not mean, however, that the Commission was unmindful of the economic impact of the registration

---

[53] 552 F.2d at 1053.

[54] *First Report and Order*, 56 F.C.C.2d at 601 n.10, Pet. App. at 15b n.10. It should be noted that the Commission's 1968 *Carterfone* decision was not appealed by the carriers or the states. To the contrary, the carriers, as they themselves concede, "filed with the states new tariffs that generally permitted customer provided terminal equipment to be connected to the telephone line . . . ." AT&T Pet. at 9. Petitioners do not challenge the legality of the general interconnection policy in their current petitions, and they have not asked that the tariffs which were filed in response to *Carterfone* be suspended pending completion of a thorough economic impact analysis.

[55] 552 F.2d at 1054.

program. To the contrary, the Commission fully considered the potential economic effects of the program and acted to mitigate the impact on the carriers.[56] For one thing, as the court below stated,[57] the Commission determined that the "potential economic consequences of any decision [regarding the registration program would be] . . . minimal," since the proceeding was concerned only with alternatives to the CA and NCSU tariff restrictions and did not involve the broader question of substitution of customer-provided for carrier-supplied terminal equipment,[58] an issue that had been settled at the time of the *Carterfone* decision. In any case, the Commission did note that, so far as the basic customer substitution policy was concerned, there had been no

> "showing before the FCC that any actual economic harm has been experienced much less that this has adversely affected any carrier's ability to serve the public." [59]

The Commission did consider the effects that elimination of the CA and NCSU requirements would have on carrier revenues. As the court below observed,[60] the Com-

---

[56] As the court below noted, "the specifics of the program—type registration, simplified registration for equipment currently in use, and grandfathering of almost all carrier equipment—" were expected to hold costs to a minimum. *Id.* at 1053. Petitioners themselves concede that a series of modifications made by the Commission in response to carrier suggestions resulted in a substantial reduction of program costs. AT&T Pet. at 27-28 n.47.

[57] 552 F.2d at 1055-56.

[58] *First Report and Order*, 56 F.C.C.2d at 601 n.10, Pet. App. at 15b n.10.

[59] *Second Report and Order*, 38 F.C.C.2d at 740, Pet. App. at 8c. The broad but unquantified allegations of some adverse economic impact that certain carriers had made were quite properly deemed an insufficient basis for denying telephone subscribers the rights that they would enjoy under the registration program. *Id.*

[60] 552 F.2d at 1054.

mission determined that this would not result in a net loss of income for the carriers. The Commission also evaluated the projected costs of the program to the carriers in light of the expected benefits to the public and concluded that the latter outweighed the former.[61] Observing that the Petitioners did not contend that this conclusion was unsupported by substantial evidence, the court below found that the Commission had evaluated and responded to the cost evidence submitted by the carriers and that it would be a "naked assertion of judicial power" for a court to second-guess the Commission's assessment of the facts and its determination of where the public interest lies.[62] Even more clearly, the issue is not appropriate for review by this Court.

The Commission did recognize that, as further information was developed, it might decide that modification of the registration program would be appropriate. Indeed, during the pendency of its inquiry in Docket No. 19528, the Commission commenced a wide-ranging investigation into the economic implications of its general interconnection policy and other matters in a separate proceeding, Docket No. 20003.[63] And the Commission

[61] *Id.* at 1052.

[62] *Id.* at 1053. *See Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974) (Interstate Commerce Commission's conclusion that consumer benefits outweighed adverse impact on the carriers is the kind of judgment that is entrusted to the agency); *General Tel. Co.* v. *United States*, 449 F.2d at 858 ("It is well-established law that it is not for the court to decide the wisdom of an agency's policies").

[63] *Notice of Inquiry*, 46 F.C.C.2d 214 (1974). In fact, before the court below rendered its decision, the Commission issued its *First Report* in Docket No. 20003. The Commission concluded

> "that interconnect competition has had no discernible adverse impact to date on telephone industry revenues or on basic local telephone service rates and availability, and that there is very little likelihood of any adverse impact in the near future." 61 F.C.C. d 766, 870 (1976).

made clear its expectation that, depending on the findings in Docket No. 20003, it might institute further proceedings looking toward possible modification or revision of the registration program.[64] However, the fact that an agency such as the FCC undertakes to review its major policies from time to time does not mean that each and every time it acts in furtherance of an existing policy —as it did when it adopted the registration program— it must revisit and reinspect the policy's foundation. Nor does it mean that when the Commission does engage in such a reexamination, all actions in furtherance of the existing policy must be indefinitely suspended until completion of the wider-ranging inquiry. Thus, implementation of the registration program did not have to await completion of the Commission's broader inquiry into the economic implications of its basic interconnection policy.[65]

[64] *Second Report and Order*, 58 F.C.C.2d at 740, Pet. App. at 8c. In addition, the Commission has undertaken to grant relief from the effects of the registration program to individual carriers by way of waiver if they can demonstrate that they will otherwise suffer economic harm that will cause "direct, substantial and immediate . . . injury to [the carrier's] telephone system and detriment to the public interest . . . ." *AT&T (Mebane Home Tel. Co.)*, 53 F.C.C.2d 473, 481 (1975), *aff'd sub. nom Mebane Home Tel. Co.* v. *FCC*, No. 75-1617 (D.C. Cir. April 30, 1976) (unpublished opinion). The fact is that as of the time of the *Second Report and Order* in Docket No. 19528, only one party, Mebane Home Telephone Company, had sought a waiver of the Commission's *Carterfone* interconnection policy on the basis of economic harm, and, at the request of Mebane, that hearing was terminated prior to the introduction of evidence. *See Second Report and Order*, 52 F.C.C.2d at 740, Pet. App. at 7c-8c.

[65] This is particularly so in view of the improbability of any adverse economic impact (as evidenced by nearly a decade of experience under *Carterfone*) and the present and demonstrable injury to the public's beneficial use of the telephone system resulting from the CA and NCSU restrictions. *Second Report and Order*, 58 F.C.C. 2d at 740, 746, Pet. App. at 8c, 18c-19c.

This Court has held that the Commission is not required to postpone a proposed course of action pending completion of a separate proceeding that may require modification of that action. *FCC* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949). *See Coastal Bend Television Co.* v. *FCC*, 234 F.2d 686 (D.C. Cir. 1956).

Section 4(j) of the Communications Act[66] confers on the Commission the discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice . . . ." It was clearly appropriate for the Commission, in its discretion, to consider the technical rules for implementing its customer interconnection policy separately from its broader examination of the economic effects of that and other existing policies.[67] Indeed, two courts have already held that it was proper for the Commission to implement its "specialized common carrier" program pending resolution of economic impact issues under consideration in the same proceeding in which the economic implications of customer interconnection are being explored.[68]

In short, having found the CA and NCSU tariff restrictions to be unjust, unreasonable, and discriminatory, the Commission prescribed the registration program. It acted only after having assessed the economic impact of the program—as distinct from the impact of its broader interconnection policy—and having found that any impact would be outweighed by the benefits of the program. It was required to go no further.

CONCLUSION

For the reasons stated above, the petiitons for writ of certiorari should be denied.

---

[66] 47 U.S.C. § 154(j).

[67] *See Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975) (upholding FCC decision to approve a rate of return for AT&T at the completion of the first phase of a two-phase investigation even though the related issue as to the earnings of AT&T's manufacturing subsidiary, Western Electric, remained to be determined in phase 2 of the investigation); *Associated Press* v. *FCC*, 448 F.2d 1095, 1105-06 (D.C. Cir. 1971). *See also FCC* v. *Schreiber*, 381 U.S. 279, 289 (1965). A court may not direct the Commission to order its docket and consider its cases in any particular priority. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

[68] *See AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d at 1142.

Respectfully submitted,

CHARLES R. CUTLER
JOHN L. BARTLETT
JOHN B. WYSS
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for Aeronautical Radio, Inc.

JOSEPH M. KITTNER
EDWARD P. TAPTICH
McKENNA, WILKINSON & KITTNER
1150 17th Street, N.W.
Washington, D.C. 20036

JOHN S. VOORHEES
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20036
Counsel for Computer and Business Equipment Manufacturers Association

HERBERT E. MARKS
STEPHEN R. BELL
WILKINSON, CRAGUN & BARKER
1735 New York Avenue, N.W.
Washington, D.C. 20006
Counsel for Independent Data Communications Manufacturers Association, Inc.

RICK M. STEIN
SIGELMAN & STEIN
9595 Wilshire Boulevard
Beverly Hills, Cal. 90212
Counsel for Phonetele, Inc.

IRVING K. KALER
KALER & FRANKEL, P. C.
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326
Counsel for Rollins Protective Services Company

JOSEPH E. KELLER
WAYNE V. BLACK
LARRY S. SOLOMON
KELLER & HECKMAN
1150 17th Street, N.W.
Washington, D.C. 20036
Counsel for American Petroleum Institute

J. ROGER WOLLENBERG
DAVID R. ANDERSON
WILLIAM T. LAKE
NEIL J. KING
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

J. GORDON WALTER
International Business Machines Corporation
Old Orchard Road
Armonk, New York 10504
Of Counsel
Counsel for International Business Machines Corporation

EDWIN B. SPIEVACK
IAN D. VOLNER
COHN & MARKS
1920 L Street, N.W.
Washington, D.C. 20036
Counsel for North American Telephone Association

CHARLES M. MEEHAN
KELLER & HECKMAN
1150 17th Street, N.W.
Washington, D.C. 20036
Counsel for Utilities Telecommunications Council

August 9, 1977